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STATE INDEMNITY FOR ERRORS OF CRIMINAL JUSTICE

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All too frequently the public is shocked by the news that Federal or State authorities have convicted and imprisoned a person subsequently proved to have been innocent of any crime. These accidents in the administration of the criminal law happen either through an unfortunate concurrence of circumstances or perjured testimony or are the result of mistaken identity, the conviction having been obtained by zealous prosecuting attorneys on circumstantial evidence.

In an earnest effort to compensate in some measure the victims of these miscarriages of justice, Congress in May 1938 enacted a law "to grant relief to persons erroneously convicted in courts of the United States." Under this law, any person who can prove that he was wrongfully convicted and sentenced for a crime against the United States may bring suit in the Court of Claims against the Federal Government for damages of not more than $5,000.

The Federal act of May 24, 1938, limits the right of recovery to innocent persons who have been both convicted and served all or a part of their sentence. The innocence must be proved either by appeal or new trial or rehearing in which innocence is established, or by a pardon on the ground of innocence. It must also appear that the erroneously convicted person either committed none of the acts with which he was charged or that those acts constituted no crime against the United States or against any State or Territory. He must also show that he has not either intentionally or by willful misconduct or negligence, such as false, voluntary confession, contributed to bring about his arrest or conviction. On the establishment of all these conditions he may sue in the Court of Claims.

Need for Legislation

The justice underlying this principle of compensation is apparent.

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But the law adopted by Congress may not, of course, be resorted to by persons wrongfully convicted under the statutes of the various States. Since the enactment of such legislation was first proposed in 1913, only three States—Wisconsin, North Dakota, and California—have enacted compensatory statutes. Clearly there is need for the legislation in every State of the Union. While the Federal law is exceedingly narrow, I urge it as a model for the State legislatures.

It is true that on occasion several States have by special act granted indemnity to the innocent victim of an erroneous conviction. Parliament in England has sometimes taken similar action. But in the United States, as in England, these special statutes are enacted only spasmodically, and not all persons have the necessary influence to bring about legislation in their own behalf.

In moving for this amendment of the criminal law by the State, we should be guided not solely by a sense of justice but also by the models and precedents in the legislation of most of the countries of western Europe. France, Holland, Switzerland, Germany, Portugal, Denmark, Norway, Sweden, and Italy now have elaborate statutes governing this subject. So do several of the countries of Latin America. Ever since the French Revolution, reformers and criminologists have sought to bring about this amendment of the criminal law, and from 1886 on they have seen their efforts crowned with success in one country after another. The States of the United States ought not to lag behind any longer.

Typical Cases

To illustrate the need for a corrective when justice stumbles, I would like to tell briefly the stories of several well-known cases. The first is that of a Hungarian immigrant named Toth. An innocent bystander at a saloon brawl in which a man was killed, Toth was arrested for the murder. Rather dull of wit, unable to speak English, and hardly knowing what was happening, he was quickly convicted and sentenced to life imprisonment. He continuously protested his innocence. After serving 20 years of his sentence his innocence was established beyond a doubt. He was released from prison a physical wreck. The law could only give him his liberty; the State legislature declined to grant him compensation and finally Andrew Carnegie extended him sufficient charity to take him to Hungary and gave him a small monthly stipend.

A case of purely circumstantial evidence occurred very recently in Georgia. Robert E. Coleman, 22 years old, came home one night from

his work as a salesman of picture frames, and, as he claimed, found on the floor of his bedroom the battered body of his 18-year-old wife. The baby was crying in its crib. The police answered his frantic telephone call and promptly placed him under arrest, charged with the murder. His dazed and harassed condition made him a poor witness, badly confused. The fact that the woman was apparently killed about the time that Coleman probably went to work in the morning, that the death-dealing weapons used, a poker, a flatiron, and a piece of wood, were all in the house, the fact that the overalls in which Coleman worked around the house were found newly washed, with suspicious stains clearly visible, that he left the house that day earlier than usual and seemed excited, that he was shaken and nervous when the police questioned him, were sufficient to convice a jury. His violent denials injured rather than helped him. The jury recommended mercy and he was sent to the chain gang for life.

Inasmuch as Coleman could supply no better explanation of the murder than the one essayed by the prosecution, it is perhaps not unnatural that the jury believed the prosecutor's version of the story. It is not always safe to be the first on the scene to find a dead body. But for the fact that a series of new murders were committed in that region over the months and years following, the truth might never have been revealed. But the new murders led to the apprehension of one James Stark, a professional killer, who not only confessed the Coleman murder, but convinced an investigating body appointed by Governor Talmadge that he alone committed it. The Governor not only pardoned Coleman, who had served 4 years, but publicly deplored the miscarriage of justice and recommended to the legislature the appropriation of $2,500 for his relief.

The celebrated *Beck* case in England arose through mistaken identity in conjunction with gross negligence by the English police, prosecuting officers and the courts. Beck served 7 years on a serious charge and was then released only because the real offender fell into the hands of the police and the mistaken identity was established. As an act of grace, due largely to the unwelcome notoriety of the case, Parliament granted Beck an indemnity. In the vast majority of cases, the poor sufferer receives no second thought from the community or any responsible authority.

False Charge of Murder

In the south, and possibly elsewhere, girls occasionally leave home

and supply no mailing address. Then somebody discovers a rag or a bone or a hank of hair, and a vivid or malignant imagination concocts a tale of murder. The clothes are identified—in a typical case—as those of Jennie Wilson. It is recalled that she had a quarrel with her husband, Bill; possibly he even once threatened her. Bill has none too savory a reputation anyway, and out of these fragments a clever prosecution and an indifferent jury piece together a conviction of murder in the first degree. Only by a lucky accident is the sentence commuted to life imprisonment. Five years later Jennie Wilson is found hale and hearty in a neighboring State, having simply gotten tired of her husband. This case is not at all unique; yet probably in many cases Jennie Wilson, although alive, is not found.

In 1909 the Reverend Ernest Lyons, a Negro preacher of Reids-Ferry, Va., was convicted of the murder of his colleague, the Reverend James Smith. The two were rivals, Smith, the pastor of the flock, having to compete with the growing popularity of his assistant, Lyons. Smith lived in the Lyons house. They were known to quarrel, and Smith was suspected of intimacy with Lyons' sister-in-law. Both were to attend the regional church conference at Suffolk, Va., on August 1, 1908, and Smith was entrusted with the contribution of $45 painfully assembled by the little congregation. It was said that during a quarrel that day Lyons had threatened to kill Smith. They left the church together on the evening of July 31, and the next day Lyons arrived at Suffolk; but not Smith. Lyons stated that he had come alone and that Smith said he would follow, but apparently did not. Nothing more was heard of Smith or of the $45. Lyons became the pastor of the church, but Smith's friends were unconvinced by Lyons' story of their last separation, and when the corpse of a large Negro was found in the river near the church in a state of decomposition, their suspicions were confirmed. The body, about the size of Smith, was buried. Various friends identified articles of clothing found on the body, and, to make it certain, a woman parishioner who had not seen the body stated that if it were Smith's they would find on the little finger of the left hand a ring with a purple setting. The body was exhumed and, sure enough, a ring exactly fitting the description given was found on the little finger of the left hand. The ring could not be gotten off, so they amputated the finger and brought it into court. A doctor testified that the man had died from a blow upon the head and had been thrown into the river dead or dying.

All this evidence of fact, circumstance, and motive was presented to a trial jury, together with testimony that Lyons had told a number of conflicting stories about the disappearance of Smith, some of which were indeed shown to be obviously untrue. Although he had throughout the trial vigorously protested his innocence, after the verdict was rendered Lyons, moved either by hysteria or revenge, told his attorney that he had in fact committed the crime but that the parishioners who had testified against him had participated in it with him. When the resulting panic among the brethren had subsided, the officials again declined to believe Lyons, who was taken to the penitentiary on an 18-year sentence. An amateur sleuth, the clerk of the court, was not satisfied that justice had been done even if the law had spoken the last word. He made it his business to visit the countryside in Virginia and North Carolina, and after some years was rewarded by finding Smith preaching to a congregation in North Carolina. Smith was induced to return to Suffolk, where he was produced before the judge, admitted that the $45 was too much of a temptation, and that he had decided to make tracks for North Carolina. He had a ring exactly like the one on the corpse. "Witnesses may lie but circumstances cannot!"

Circumstantial Evidence

Herbert Andrews, of Boston, signed a check for goods purchased, but the fact that the merchant failed to deposit it for some weeks resulted in its return from Andrews' bank with a notation "No account." Thus it reached the police. A wave of bad checks was then passing over Boston, and at last a clue was at hand. Andrews was taken from his home; experts agreed that the handwriting on the Andrews' check and on the forged checks was the same; 17 witnesses took the stand and identified Andrews as the bad-check passer. Inspector Conboy insisted that he had not made a mistake in 40 years' police service, and Andrews was duly convicted after spending the little money his family and friends could muster. Only the fact that Earl Barnes, the real forger, continued to pass the same kind of checks after Andrews had reached the penitentiary began to arouse suspicion that perhaps Inspector Conboy had made his first mistake, and a bevy of other people had similarly failed. When the two men, Andrews and Barnes, stood at the bar, the dissimilarity between them was striking. The State admitted its error, but that was all. Andrews was released. Only the thoughtfulness or carelessness of Earl Barnes in continuing to pass bad checks saved

Andrews. Those who draw inferences from circumstantial evidence are subject to the same human weaknesses as those who make wrong identifications, and that is the reason why juries occasionally convict the wrong man.

An Egregious Error

In one of the most sensational cases tried in the South, Will Purvis, of Mississippi, a lad of 19, a member of the Whitecaps, a sort of Ku Klux Klan, was convicted of murdering a fellow Whitecap, Buckley, who had complained to the authorities of the flogging of his Negro servant, and had thereby incurred the enmity of the Whitecaps. Suspicion was thrown upon Purvis by an envious neighbor, who had repeatedly attempted to acquire his land holdings, and two days after Buckley's killing in the woods, bloodhounds, after much coaxing, picked up a cold scent which led them in the direction of the Purvis home. That was enough for the mob, and when the victim's brother identified Purvis as one of the assassins, of whom he could have caught only a fleeting glimpse, a jury readily convicted. As Purvis was strung up to be hanged, the rope broke and Purvis fell to the ground unhurt. Whether Purvis had been "hanged," as the law had demanded, became a political question, even after the Supreme Court declared he had not been. Governor McLaurin fought his campaign on that issue. The sentence was commuted, and 25 years later it was established beyond a doubt that Purvis had had nothing whatever to do with the murder. The State of Mississippi granted him $5,000 for its egregious error. Purvis died recently, a respected citizen, the father of 11 children.

A recent case in New York, that of Philip Caruso, involved an erroneous identification by the victim of a robbery. Even the judge advised the mistakenly identified accused to avoid a long trial and confess. This case has been written up entertainingly by Mr. St. Clair McKelway in the *New Yorker* for November 11, 1939, and awakened renewed interest in the subject. A bill to indemnify innocent, convicted persons was introduced in the New York Legislature but did not pass.

II

The matter with which we are now concerned is to ascertain whether the State, by simply opening the jail door, has completely fulfilled its obligation toward these unfortunate victims of the errors of justice. Let us note what the State has done in these cases. It has taken the man from his daily occupation by mistake, either because circumstances ap-

peared against him or because he looked like the real criminal, or for some other mistaken cause. The State must, of course, prosecute persons suspected of crime; but when the facts subsequently show that it has convicted and imprisoned the wrong man, an innocent man, does not the State owe the victim of its mistake compensation for the special sacrifice he has been compelled to make in the public interest?

State Can Do No Wrong?

Our law begins with the assumption that the State can do no wrong, and it is therefore apt to be indifferent when by its own wrong it has injured a private individual. With the progress of time, however, the State has come to make compensation for many of its wrongs, and our Federal Government and practically all the States for many cases now subject themselves to suit at the hands of injured individuals. It was for this purpose that the Federal Court of Claims was established. Again, the State freely admits that, for certain interferences with private rights in the public interest, compensation to the private individual must be made. Thus, when his property is taken for a public use, such as a public building or a road, compensation is made. This is fundamental. Yet when the liberty of an individual is taken for the public use—and the preservation of the public peace through the administration of the criminal law is a public purpose at least equally vital to social welfare as the erection of public buildings—the right to compensation is apparently overlooked. Why? Dean Wigmore has well said:

> "Because we have persisted in the self-deceiving assumption that only guilty persons are convicted. We have been ashamed to put into our code of justice any law which *per se* admits that our justice may err. But let us be realists. Let us confess that, of course, it may and does err occasionally. And when the occasion is plainly seen, let us complete our justice by awarding compensation. This measure must appeal to all our instincts of manhood as the only honorable course, the least that we can do. To ignore such a claim is to make shameful an error which before was pardonable."

Theories of Compensation

Two main theories underlie such compensation. The first is the principle involved in the exercise of eminent domain—that is, that the owner of private property taken for public use shall be compensated. In this case private liberty, a right at least as sacred as that of property, is taken for the public use.

The other theory is the same as that which supports workmen's compensation. The principle is this—that in the operation of any great undertaking, such as the management of a large industry or the administration of the criminal law, there are bound to be a number of accidents. In other words, among the thousands that are annually convicted, some will be wrongfully convicted through mistake. We have recognized, in certain spheres of activity, that it is unfair to the individuals injured that they alone should bear the entire loss resulting from the accident, and therefore society distributes the loss among its members. Where the common interest is joined for a common end—maintaining the public peace by the prosecution of crime—each individual member being subject to the same danger (erroneous conviction), the loss when it occurs should be borne by the community as a whole and not by the injured individual alone.

III

We must distinguish two classes of injustice of the character under discussion. The first is the detention of an erroneously accused innocent person extending up to his acquittal. An injustice has here been done, undoubtedly, in that the accused has been unjustly detained and put to the trouble and expense of defense against a criminal prosecution.

Yet the case of unjust detention pending trial is left aside in order that we may deal with the much more flagrant injustice of a conviction of an innocent person followed by sentence and imprisonment. Where the facts show that the conviction has resulted through no demerit of his own, certainly the State owes the victim compensation for the grievous wrong he has been compelled to suffer. Most of the European countries provide for indemnification in both cases, that is, detention pending trial which results in acquittal, and the still harsher case of unjust conviction and imprisonment. We propose to deal now with the practical features of compensation in the case of erroneous conviction.

Right to Compensation Should Be Limited

A right to relief of this kind might be abused if it were not strictly limited. We propose, therefore, so to limit the right to compensation that its benefits could be obtained only in cases of the grossest injustice and most deserving relief. Here much may be learned from foreign legislation.

It is clear that we cannot compensate every acquitted person. In

fact, under our lax administration of the criminal law and the possibility of technicalities producing injustice, we know that many morally guilty persons are legally acquitted.

We would first, therefore, compel the unjustly convicted person claiming the right to relief to prove that he was innocent of the crime with which he was charged and not guilty of any other offense against the law. And here he must satisfactorily show one of two things—that the crime, if committed, was not committed by the accused or that the crime was not committed at all. This at once eliminates from consideration a vast class of possible claimants.

In the second place, the loss indemnified should be confined to the pecuniary injury, that is, loss of income, costs for defense and for securing his ultimate acquittal or pardon, and similar losses. It is true that the pecuniary injury is in these cases the smallest element of loss; the damage to reputation and mental suffering are by far the greater injuries. To compensate this moral injury, however, might entail severe burdens on the State treasury and open the way to speculative claims. For this reason it might be better to exclude from all possibility of claim the moral injury suffered. In any event we would limit the amount of the relief to $5,000, as the highest sum recoverable.

Other Limitations

Again, certain other limitations must be provided for, either specifically, or by consideration of the court awarding the compensation. For example, the accused must not by censurable conduct of his own have caused his arrest, prosecution, or conviction; thus, the concealment of evidence, the voluntary making of a false confession, or any similar reprehensible act should operate as a bar to the claim. This follows the well-known maxims that a claimant must come into court with clean hands, and that no one shall profit by his own wrong. As the award of an indemnity is to be discretionary, the court should take into consideration all the circumstances of the case which may defeat or in any other way affect the right to and the amount of the relief.

There may be some difficulty in the matter of procedure, although this can easily be adjusted. The Federal act leaves the award of indemnity to the Court of Claims. A similar State court having jurisdiction of claims against the State would be the forum most appropriate for this relief, more so than the trial, appellate, or second trial court, even though these courts could perhaps better judge of the intrinsic

merits and circumstances of the case. Moreover, an executive pardon is often based on evidence which has never been submitted to a court. We advocate jurisdiction being given to a court of claims in order to maintain the traditions of American judicial procedure. If the jury or trial court were given the right to pronounce on the propriety of an award in a case of acquittal (as is the case in some of the European countries), it would bring into our law a new kind of acquittal in which the jury or judge could acquit with degrees of approval or sympathy, a procedure which might give rise to odious distinctions. While it would be desirable to have the benefit of the special knowledge of the case secured by the trial court or by the jury, it is better to forego this advantage for the sake of conformity with legal custom and to leave the establishment of the damage to a court having jurisdiction of other claims against the State.

Infrequency Not a Valid Objection

It may be argued as an objection to such a measure that the case is of infrequent occurrence. The very fact, however, that there will be few demands on the State treasury should overcome any hesitation there may be to enact appropriate legislation. The mere infrequency of the case is no reason for a failure to acknowledge the principle and to remedy the wrong. It makes the individual hardship when it does occur seem all the more distressing. Dean Wigmore has explained our previous indifference to the grievous injustice thus inflicted on innocent individuals as follows:

> "It is nobody's interest, apparently, to move for such a law. You and I have never suffered in that way; no large business is threatened; no class of persons feel a loss in their pockets; and so nobody exerts himself. Only the casual victims feel the wrong and to expect them to unite in a demand for legislation is absurd."

APPENDIX

MODEL BILL PROPOSED FOR ENACTMENT BY THE STATES TO PROVIDE RELIEF TO PERSONS ERRONEOUSLY CONVICTED

Based on the Federal Act of May 24, 1938

Be it enacted by the Senate and House of Representatives of the State of .....,

Section 1. Any person who, having been convicted of any crime

or offense against the State of ..... and having been sentenced to imprisonment and having served all or any part of his sentence, shall on appeal or on a new trial or rehearing be found not guilty of the crime of which he was convicted, or shall receive a pardon on the ground of innocence, may maintain suit against the State of ..... in the Court of Claims (or other State court which by statute may be provided) for damages sustained by him as a result of such conviction and imprisonment upon—

(1) Proving to the satisfaction of such court after notice to the Attorney General the following facts:

(a) That claimant did not commit any of the acts with which he was charged; or

(b) That his conduct in connection with such charge did not constitute a crime or offense against the State of ..... or against the United States or any State, Territory, or possession of the United States or the District of Columbia; and

(c) That he has not either intentionally or by willful misconduct or negligence contributed to bring about his arrest or conviction; or

(2) Submitting to said court a certificate of the court in which such person was adjudged not guilty or a pardon or certified copy thereof containing recitals or findings of said facts, which shall be conclusive evidence thereof.

Section 2. Upon a showing satisfactory to it, the Court of Claims (or other statutory court referred to above) may permit the claimant to prosecute such action in *forma pauperis*.

Section 3. In the event that the court shall render judgment for the claimant, the amount of damages awarded shall not exceed the sum of $5,000.

Section 4. The Court of Claims (or other statutory court referred to above) is hereby authorized to make all needful rules and regulations for the purpose of carrying into effect the provisions of this Act.